IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 46 of 1997

in

SPECIAL CIVIL APPLICATIONNo 160 of 1997

For Approval and Signature:

Hon'ble THE ACTING CJ R.A.MEHTA and
MR.JUSTICE C.K.THAKKER

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MANVAR SHANKERBHAI MANSANG

Versus

PANDYA SHANKERLAL AMIRAM

Appearance:

MR KS JHAVERI for Petitioner

CORAM : THE ACTING CJ R.A.MEHTA and
MR.JUSTICE C.K.THAKKER

Date of decision: 18/01/97

ORAL JUDGEMENT (Per R.A.Mehta, Act.C.J.)

1. This Letters Patent Appeal is filed against an order passed by the learned Single Judge in Special Civil

Application No. 160 of 1997. By the said order, the learned Single Judge dismissed the petition filed by the petitioner for recounting of votes.

2. It is the case of the appellant that election of Sarpanch of Lodarani panchayat was held on June 21, 1995. It was reserved for Schedule Caste. Over and above the appellant, nomination of Respondent Nos.1 and 2 were also accepted by the Election Officer. The polling took place on June 21, 1995. Votes were counted on June 24, 1995 wherein 1st respondent was foundm to have got largest number of votes to get elected candidate. Recounting was demanded by the appellant which was granted. On recount, the appellant was found to have polled maximum number of votes and was declared as elected candidate.

In these circumstances, first respondent filed Election Petition No.2 of 1995 in the Court of the Civil Judge (J.D.) Tharad under Section 31 of the Gujarat Panchayats Act, 1993 on July 5, 1995. On the same day, he filed an application, Exh.5 for recounting of votes on which notice was issued by the election tribunal and hearing was fixed on July 17, 1995. The appellant filed his reply to Election Petition as well as to application for recounting. On December 18, 1996, the tribunal allowed application Exh.5 for recounting filed by the first respondent. At the request of the appellant, however, the order was stayed upto January 18, 1997. The appellant approached this court by filing Special Civil Application No. 160 of 1997 on January 8, 1997. On January 17, 1997, the learned Single Judge dismissed the petition. It is against that order that the present appeal is filed.

3. Mr.Zaveri, learned counsel for the appellant mainly raised three contentions. Firstly, the learned Single Judge has committed an error of law in observing that the petition was filed under Art.227 of the Constitution of India and not under Art.226 thereof. Secondly, the learned Single Judge should not have granted recounting after the appellant was declared as returned candidate by the Election Authority. In any case, such an action could not have been taken at interim stage, virtually allowing the Election Petition filed by the first respondent. Finally, the learned Single Judge has committed an error of law apparent on the of the record in not following two decisions of this Court, in Kakvani Hasumal Lilaram v. Bhakhrani Gafar Alimohmad & ors, (19720 XIII GLR 624 and Mansukhlal Pujalal vs. Assistant Collector, Jamnagar, (1996) XXXVII(2) GLR 442. The learned Single Judge has not even referred to those

two decisions even though cited at the Bar.

4. In the facts and circumstances of the case, we are of the view that the order passed by the learned Single Judge does not call for any interference.

5. Without expressing final opinion as to maintainability or otherwise of the Letters Patent Appeal, we proceed to consider the merits of the matter. The first contention, therefore, does not survive.

6. Regarding the remaining two contentions, from the facts of the case, it is clear that the question is of recount of votes. At the counting, the first respondent secured 186 votes i.e. one vote more than the appellant, who had secured 185 votes. The appellant demanded recounting, which was granted. At the recounting, the appellant secured 184 votes as against first respondent who secured 183 votes. In these circumstances, the first respondent filed Election Petition and alongwith the petition, he filed an application Exh.5 praying for recounting, which was granted by the tribunal.

From the facts stated above, the position appears as under;

	First Count.	Second Count	Invalid votes
First Respondent	186	= 183	+ 3
Appellant	185	= 184	+ 1
Second Respondent	67	Not taken in second count.	
Invalid.	11	" " " "	
	449		

7. Thus, lead of one vote has tilted the balance. As far as 67 votes of second Respondent (third candidate) and 11 invalid votes are concerned, there was no recounting at all.

8. It was contended by the first respondent that at the time of recounting of votes, three valid votes in his favour were illegally declared as invalid votes and the appellant was declared as successful candidate. 67 votes secured by the third candidate and 11 votes declared as invalid were not scrutinised and no recounting was ordered. It was also alleged that there was disorder and proper recounting was not made.

9. The tribunal granted recounting. It also referred the decisions of this court in Kakvani Hasumal Lilaram and Mansukhlal Pujalal.

10. Having regard to narrowest margin of difference of one vote only, and there was change of result and non-consideration of 67 votes of the third candidate and 11 invalid votes at recounting, in our opinion, there was sufficient cause for permitting the recount.

11. Mr.Zaveri relying on Rule 61 of the Gujarat Gram Panchayat Election Rules, 1994, submitted that the Returning Officer could order recounting either wholly or in part. At the instance of the appellant there was recounting which was allowed. At recounting, the appellant succeeded.

At that stage, the first respondent had not asked for second recounting. That would not, however, prevent him from challenging either the validity of the election or from making prayer for recount again.

12. Kakvani Hasumal Lilaram on which strong reliance is placed by Mr.Zaveri, in our opinion does not deal with the problem in its proper perspective. In that case, the learned Single Judge has held that in absence of evidence worth the name, the order of recount/scrutiny cannot be passed. The principle of secrecy of ballot papers would require that on nebulous allegations, secrecy may not be violated. In that case, recount and scrutiny was sought on the basis of assertions which were neither accompanied by a statement of material facts nor supported by any evidence.

13. As far as secrecy of ballot papers is concerned, that question would arise when a prayer is made for inspection of counter foils of ballot papers. In counting and recounting of votes, in our considered opinion, the question of violation of secrecy does not arise at all. In that way, even first counting also cannot take place. On the ground of secrecy, the prayer of recounting could not have been rejected. The observations of the learned Single Judge in Kakvani Hasumal Lilaram cannot apply to cases where question is not of inspection of counterfoils of ballot papers but counting of votes. To that extent, the ratio laid down in Kakavani Hasumal Lilaram has to be overruled.

14. In Shashi Bhusan v. Balraj Madhok, AIR 1972 SC 1251, Supreme Court observed that secrecy of ballet papers is important but doing justice is undoubtedly more

important, and it would be more so, if what is in stake is the interest of the society. In that case, "fantastic and improbable allegations" were made of mass rigging of ballot papers by "magic ink". The Supreme Court stated that even if the allegation is nothing but a propaganda stunt, it is in public interest that the falsity of that propaganda should be exposed. The confidence in our electoral machinery should not be allowed to be corroded by false propaganda.

15. In the present case, at first counting, the first respondent got lead of one vote but at the recounting, it was reversed and reduced to trailing of one vote; that also due to rejection of the votes which were held valid earlier. All these things indicate that a second look is necessary in order that reasonable and probable doubts are removed and correct result is ascertained. Exclusion of 67 votes of the third candidate and of 11 invalid votes at the time of the recount was also not justified. In view of the fact that some votes have changed from valid to invalid, it was absolutely necessary that all votes are reexamined and recounted. We, therefore, direct recounting of all the votes.

For the foregoing reasons, we do not see substance in this appeal and dismissed the same.

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